UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 12-12020-mg

- -x

In the Matter of:

RESIDENTIAL CAPITAL, LLC, et al.,

Debtors.

- -x

United States Bankruptcy Court

One Bowling Green

New York, New York

August 16, 2012

11:04 AM

B E F O R E:

HON. MARTIN GLENN

U.S. BANKRUPTCY JUDGE

(CC: Doc# 1093) Application for FRBP 2004 Examination Motion of the Examiner for Entry of an Order (I) Granting Authority to Issue Subpoenas for the Production of Documents and Authorizing the Examination of Persons and Entities, (II) Establishing Procedures for Responding to Those Subpoenas, (III) Approving Establishment of Document Depository and Procedures to Govern Use, and (IV) Approving Protective Order.

(Doc# 90, 47) All Day Evidentiary Hearing RE: Motion Authorizing The Debtors To Continue To Perform Under The Ally Bank Servicing Agreements In The Ordinary Course Of Business.

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P R O C E E D I N G S

THE COURT: Please be seated. All right. We're here in Residential Capital, LLC, number 12-12020. Mr. Lee?

MR. LEE: Good morning, Your Honor. The first item on the agenda today is the status conference on the subservicing motion. It's Gary Lee from Morrison & Foerster for the debtors.

The parties, Your Honor, are still engaged in what I can now describe as very earnest discussion moving quite close. What we'd like, Your Honor, if we may, is to set a telephonic status conference with Your Honor. Because of various meetings that need to occur in advance, it might not be possible to do it until Thursday of next week. I'm not sure what Your Honor's vacation schedule was. So --

THE COURT: Thursday the 23rd?

MR. LEE: Yes, Your Honor.

THE COURT: Dewey & LeBoeuf and Grubb & Ellis, so I'll be here. I have both a morning and afternoon calendar. We could have a call at 4 o'clock.

MR. LEE: That would be ideal, Your Honor. Thank you.

THE COURT: Okay. Thursday, August 23 at 4 o'clock, telephonic conference.

MR. LEE: Okay. Your Honor, if it is resolved, what we'll try and do is submit a stipulation setting out the terms of the settlement in advance of the status conference. And

then, Your Honor, the question will be whether or not Your Honor will be satisfied with the explanation that we provide of a stipulation or whether you will want a hearing on the motion. We're happy to present just a stipulation, given the complexity.

THE COURT: Well what -- we can talk about it in the call. What I may have you do is do it on presentment, so that if there are going to be objections, it gives any other parties an opportunity to object. Given the level of controversy and parties with varying interests, I don't think I would enter -- approve a stipulation on this issue without giving others an opportunity to object, if that's what they were going to do.

MR. LEE: Thank you, Your Honor.

THE COURT: Okay.

MR. LEE: The --

THE COURT: It would still be helpful if you have a form of stipulation that you provided before that call.

MR. LEE: It would be very helpful, Your Honor, yes.

THE COURT: Right.

MR. LEE: The second item on the agenda, which is a contested matter, is the motion of the examiner. So I will turn the podium over to Mr. Seife.

THE COURT: Okay. Thank you, Mr. Lee.

MR. SEIFE: Good morning, Your Honor. Howard Seife from Chadbourne & Parke, counsel for the examiner. We're here

this morning on the examiner's motion regarding really three things we're seeking approval of, which will greatly facilitate the examiner's ability to conduct his investigation in an expeditious and efficient manner.

The relief we're seeking, as I said, is really threefold. First is under Rule 2004, seeking authorization for the examiner to issue subpoenas for the production of documents and for the examination of witnesses, without the necessity of coming back to the Court each time.

THE COURT: And I didn't see any objections to that request for relief, right?

MR. SEIFE: That is correct, Your Honor.

THE COURT: Okay.

MR. SEIFE: And in conjunction with that, it would also establish procedures for parties to respond to those subpoenas. And again, no objection on that score.

And as we made clear in our papers and prior meetings with Your Honor, we hope very much to have the discovery conducted on a cooperative basis. To date, all the parties that we've approached have professed willingness to cooperate without the necessity of subpoenas. But it is an important arrow in the quiver of the examiner to have that ability to issue subpoenas.

The second element of the relief we're seeking is for the establishment of a central document depository and

procedures governing its use. Again, there is no objection to the concept of establishing a depository. The objections, and there have been two limited objections filed -- one was by Cerberus and the other was by Ally -- really involved the third aspect of the relief, which is the protective order, which would facilitate parties producing documents and governs the accessibility of those documents for use by the examiner and access by third parties.

Also, there was an objection to the initial list of parties that would get access to the depository.

THE COURT: The service parties.

MR. SEIFE: The service parties, right. I think it's important to note at the outset, Your Honor, that the examiner consulted with a whole variety of different parties before bringing this motion, with the hope of bringing it on a fully consensual basis. That proved not to be possible, given the competing interests of various parties. We were pleased that we had the support of both the debtor and the committee at the end of the day, to the relief we're seeking. Despite having discussions with Cerberus, they, at the end of the day, did have some misgivings about the relief we're seeking. And they're here, I assume, to make their objections.

I can go into some detail, if Your Honor would like, as to how we've set up --

THE COURT: No, I --

MR. SEIFE: -- the depository?

THE COURT: Tell me the mechanics of what you're doing. Because I assume a lot of the documents you'll receive in electronic format initially. But you may also be receiving paper, if anybody still uses paper. And that wasn't clear. I mean, what are the mechanics? Are you going to scan everything and --

MR. SEIFE: It'll be a fully electronic depository. In this day and age, virtually everything produced is in electronic form. If it's not, it'll be scanned and made available.

THE COURT: One question I have; in paragraph 16 on page 12 of Exhibit B, your uniform protective order.

MR. SEIFE: That was paragraph 16, Your Honor?

THE COURT: Yes, on page 12.

MR. SEIFE: Yes.

THE COURT: This is the provision that provides that after the date that is ninety days after the examiner's finished, you use the terms "deactivate" and "terminate". I don't know what that really means. And the debtors filed in their statement they don't want to have to produce things more than once.

I understand that the examiner will have no duty to maintain or retain or make available anything in the depository. But what happens when the examiner is done? Is

someone going -- is the debtor going to retain the database? Is anybody else going to do it? Subject to what limitations?

Because hope -- well, it would be nice if everything were done in six months, but the likelihood of that is not great. So what happens when the examiner's finished and you would have the right to deactivate it and terminate it?

MR. SEIFE: Yes, Your Honor. There is a cost to maintaining the electronic --

THE COURT: Yes.

MR. SEIFE: -- database, and there are ongoing efforts. Presumably, once the examiner has issued his report, and there are no further requests made of the examiner, then the position would terminate. So it would make no sense for the examiner to continue --

THE COURT: Correct.

MR. SEIFE: -- this. Certainly, if the debtor wants to maintain the database, we would work with the debtor or the committee, whoever is the most appropriate party. So it would not be our intention to not work cooperatively with the parties if they wanted to continue to maintain it or use it for any other purposes.

THE COURT: Do you think there needs to be some -- the way it's drafted now, ninety days after the issuance of the examiner's report, the examiner may deactivate and terminate, shall have no duty to maintain or retain or make available. I

think whether it goes in this protective order or somewhere else, there at least needs to be a mechanism for the debtor or the committee to come back to the Court to seek to do something with it. I mean, I just -- it's clear that the examiner and his professionals should not be the ones to bear the burden of maintaining the database afterward.

But it does seem to me that there's going to be -- this is the debtors' money that's going to be invested in creating and maintaining the database. And so whether it's something that says -- that makes it subject to further order of the Court, I don't know. But I just -- the way it was drafted now, you could just go ahead and -- I don't know what deactivate and terminate means, necessarily, but I got the gist of it.

MR. SEIFE: We're happy to modify that, Your Honor, to reflect that it's subject to further order of this Court.

THE COURT: Okay.

MR. SEIFE: That would be fine.

THE COURT: Let me hear from Cerberus' counsel, and then -- because I do have some questions. They had the most specific objections about the scope of who would have access and the designation of "professional's eyes only" versus "highly confidential", et cetera. So let me hear from Cerberus' counsel.

MS. GARDINER: Good morning, Your Honor. Marguerite

Gardiner, from Schulte Roth, on behalf of Cerberus Capital. I'd just like to preface my argument by noting that Cerberus' limited objection is in no way substantive. It's a procedural objection, and it really relates to who, as you stated, who has access to the information produced. And by that I mean this objection does not relate to the scope of the examiner's investigation.

THE COURT: I understood that.

MS. GARDINER: And so we don't intend to address that here and don't have issues at this point.

Really, the proposed procedures raise three concerns for us. First, as noted, the broad access that will be allowed by the use of the special services list or the special service list; second, the designations; and then third, the issue that arises really as a result of the first two, which is the lack of use restrictions on the material that's collected.

To back up a little bit, Cerberus is one of several entities that received a subpoena from the committee. And the subpoena was quite broad, seeking, essentially, all documents relating to the debtors over an eight and a half year period. As the examiners noted, this is going to -- a lot of materials will be collected, and Cerberus has concerns about the confidentiality of the materials collected, how that will be treated.

So with respect to the access issue and using the

special service list, Rule 2004 is relatively clear that access is granted to an examination or to materials only on motion of the party. And the courts have underscored that there's an affirmative duty to show good cause why one's entitled to such broad discovery. Really, this type of discovery has been described as a fishing expedition, and is broader than discovery that would be --

THE COURT: Tell me what happens when the plaintiffs in -- when FHFA, which has been very aggressive, files a motion for access to this database. Is there law developed about when -- because I know the protective order purports to limit use to the Chapter 11 cases, and you have an objection about that language as well. But let's assume that by its terms, it's limited to the Chapter 11 cases. Is there any case law that's developed about what happens when a party such as FHFA files a motion for access to all of the documents in the examiner's database?

MS. GARDINER: Well, I think, essentially, what the courts require are one, a showing of good cause for the development of claims relating to the bankruptcy case and a weighing of the competing interests of the parties. And again, there's an affirmative duty to show that the use of the materials relate to the administration of the estate.

THE COURT: Has this issue been litigated?

MS. GARDINER: Well, I guess if the question is, have

individual creditors sought access --

THE COURT: You give examples of similar types of protective orders, I think, the Tribune case, and I don't know whether there were some others that had been mentioned. Have there been challenges -- have there been motions of plaintiffs in pending cases to gain access to an examiner's database?

MS. GARDINER: In the Enron case, which we cite, the --

THE COURT: I didn't go back and read Judge Gonzalez's opinions.

MS. GARDINER: That's okay.

THE COURT: I'm generally familiar. But what did he decide there?

MS. GARDINER: So what happened there was the plaintiffs in a pending securities action -- I think it was in Texas -- sought access to the 2004 materials. And they did so in their capacity as plaintiffs in the securities action. And the Court said clearly that is not the appropriate use. You can't circumvent the limitations that are imposed under -- I mean, there under the PSLRA, but more generally under the Federal Rules and the discovery limitations imposed by the Federal Rules -- you can't circumvent those rules by seeking access to 2004 materials. I think the --

THE COURT: Even if the same materials would be discoverable in the underlying cases?

MS. GARDINER: Yes. I mean, I think, again, the courts weigh the interests. And to the extent there is a good basis for a party who is a party-in-interest to access the materials, that that is something that needs to be weighed. But --

THE COURT: Which of Judge Gonzalez's opinions in Enron cover -- was it his opinion or --

MS. GARDINER: It was his opinion.

THE COURT: On page 6 of your limited objection you cite -- that's actually a district court opinion you cited here in Enron. You don't have to find it now. If you or one of your colleagues can point me to it, I'd like to --

MS. GARDINER: To the Enron?

THE COURT: Yes.

MS. GARDINER: The citation for the Enron case? Sure.

THE COURT: Because what I'm looking at, the one I found on page 6 is a district court citation, not a bankruptcy court citation.

MS. GARDINER: Oh. Well, the citation I have is 281 B.R. --

THE COURT: Hold on.

MS. GARDINER: -- 836.

THE COURT: Okay.

MS. GARDINER: I do have one copy of it, but --

THE COURT: No, no. That's all right.

MS. GARDINER: Okay.

THE COURT: So what's wrong with the special service list defining who gets access?

MS. GARDINER: Well, the special service list contains parties just by default who haven't: 1) expressed any interest in accessing the materials that will be at issue; and 2) and haven't shown any good cause for access to it. So those would include the debtors' pre-petition lenders, representatives of the DIP lenders, Nationstar Mortgage, which is a stalking-horse bidder in certain of the debtors' assets, the IRS, the SEC, the U.S. Attorney General's Office, the New York Attorney General's Office.

THE COURT: You're not anxious to have all of them get access to your documents?

MS. GARDINER: Well, and there's just no -- yes, there's no -- without any cause, there's no reason for all these parties to have access to sensitive information, particularly in light of the scope of the discovery.

I'd also point out that list is likely to grow. So any time a party seeks to be added to the special service list, that has implications with respect to the data collected, that just the two -- there's no rational link between the two.

THE COURT: Okay. Tell me about -- you also objected to the definitions of "highly confidential" and "professional eyes only".

MS. GARDINER: Okay. Well, our first concern with respect to "highly confidential" -- and I can offer, I know we didn't attach a mark-up, and I can offer one up, if you're interested.

THE COURT: You submitted something, but it wasn't a black-line, so I wasn't able to follow --

MS. GARDINER: Okay. I do have a black-line if that would make this easier.

THE COURT: It would. It would. Give one to one of my law clerks as well. Thank you.

MS. GARDINER: So --

THE COURT: This is a black-line against the one that --

MS. GARDINER: Against --

THE COURT: -- Mr. Seife submitted?

MS. GARDINER: Yes. So it's our submission as against their submission, reflecting our proposed additions to the order.

With respect to "highly confidential", if you'll flip to page 7 paragraph 7.

THE COURT: Yes.

MS. GARDINER: To back up a bit, highly confidential materials under the -- will only be disclosed to the examiner and won't be included in the database. As defined by the examiner's order, highly confidential material will only

include privileged information or attorney work product. Cerberus, as a third party, has no intention of producing privileged materials or attorney work products. So this, as it stands, this wouldn't even apply to us, to any production by Cerberus.

So we would propose expanding this definition to allow for this heightened protection for particularly sensitive materials. In an earlier draft circulated by the examiner, this Romanette ii was included. And I gather during the course of negotiations that came out. So Cerberus, again, expects that given the volume of information produced, it's possible and likely that some of the information will run the risk of resulting in direct and imminent competitive harm if disclosed to the parties here.

Again, we don't dispute the examiner's right to access the information, but there simply isn't any need for it to be disclosed to such a broad range of parties.

THE COURT: Where is the provision -- this deals with "highly confidential" -- where is the "professional eyes only"?

MS. GARDINER: "Professional's eyes only" is paragraph 5. It's an earlier page. And we do -- we have some comments to the content of material that would be designated "professional's eyes only", but also with respect to -- in the next paragraph, in paragraph 6, the notion that that material would be available to the financial advisors of individual

committee members.

THE COURT: I had a lot of problem -- referring to your objection on page 10, paragraph 16, discussing professional eyes only.

MS. GARDINER: Um-hum.

THE COURT: You say, "But Cerberus proposes that the examiner's definition be modified to restrict access to any Rule 2004 material that may present a risk of harm to the disclosing party, not merely competitive harm, as the examiner proposes."

I mean, are you given the unilateral right -- given the definition that you have, you can just say, oh, I think this presents a harm to me. I'm not going to produce it. I'm even troubled with competitive harm, whether that's too restrictive. But taking that out and just saying any risk of harm, everybody will think oh, yeah, the risk of harm is somebody will get a hold of it and sue me.

MS. GARDINER: Well, you know, again, I think the order is prefaced with the notion that these designations will be used in good faith.

THE COURT: I should tell everybody that -- and we have to talk about how disputes come to me. Because I have some problem with the provisions that were put in. But if people start presenting issues to me about what's highly confidential, what's professional's eyes only, I take a very

narrow -- I'm putting everybody on notice right now -- my view is as much as possible should be disclosed as broadly as possible.

Yes, competitive information can be maintained as confidential, but I look at that very carefully. So when I saw this change that you were proposing on "professional eyes only", I really kind of gulped and -- give me the justification for it.

MS. GARDINER: Well, I think, again, the --

THE COURT: Where is that language actually reflected? When I tried to go back to the order and see where you had made that change, I --

MS. GARDINER: That's in paragraph 5 of the proposed order.

THE COURT: Okay. You took out the word "competitive", and just have "risk" --

MS. GARDINER: Yes.

THE COURT: -- "of harm". Okay. And what's the justification for that?

MS. GARDINER: Well, the justification would be -- I mean, competitive is unduly narrowing, we think. Again, I don't --

THE COURT: And risk of harm is unduly broad.

MS. GARDINER: So there may be a compromise to be forged there.

THE COURT: Actually, I don't think there's going to be a compromise.

MS. GARDINER: Okay. Fair enough. I guess I would just point out that to the extent -- again, we expect that there will be a large number of documents produced. And to the extent there is an issue with a particular document that the examiner feels should be more widely distributed, there are mechanisms by which the examiner can raise that question with us.

I think our concern is, going into this, as a default for things to be widely disclosed is problematic when some of that information, much of that information, may ultimately not end up being of huge interest to the examiner or used in the report. And the examiner can do his job -- again, none of this restricts access by the examiner to the information. This is simply restricting the disclosure to additional parties.

THE COURT: Address for me what you have in paragraph 17 of your limited objection, your objection to disclosure to committee members' -- of professional eyes only to committee members' financial advisors.

MS. GARDINER: Well, this ties in to, again, our broad access, our view on the special service list, which is that the committee has been charged with representing the collective interests of the creditors of the estate. To the extent individual creditors want access to and are entitled to this

material, they should be entitled to make that showing. They should bear the burden, but also be entitled to make that showing that they're entitled to such access.

The idea that their individual financial advisors can access the information doesn't -- sort of runs along the same -- presents the same problem.

THE COURT: Why is that? If they're subject to the protective order, in other words, if any professional who receives the information has to be bound, agrees to be bound by the protective order, the members of the committee, many are large institutional entities. And frequently, they work through professional -- in a case like this, they use professional advisors. So why shouldn't they be able to use -- if the committee member is entitled to access to professional eyes only material, and you agree they are, right?

MS. GARDINER: Yes. Sorry, no. The committee members are not -- professional's eyes only, the point is to restrict access to the business people.

THE COURT: So --

MS. GARDINER: So it's the professionals that are entitled to view the information.

THE COURT: All right. So the outside counsel for a committee member is entitled access to the professional eyes only material, right?

MS. GARDINER: I think, our view would be counsel to

the committee is entitled.

THE COURT: Where do you -- your specific objection here was to committee members' financial advisors. It doesn't say committee members' counsel. It says specifically on page 11, the third line in paragraph 17, your objection was to disclosing to committee members' professional advisors under any circumstances. I didn't see that you were objecting to disclosure to a committee member's counsel.

MS. GARDINER: Well, I think, one, in the interest of trying to limit our objection. But in addition, the financial advisors are frequently, I think, in the same business world as our client. And so to the extent those -- that information --

THE COURT: So the lawyers who rely on -- if they're going to do that -- I mean, of course part of the problem is, when you restrict it for use in the narrow use that is already in the draft permitted, it leads to potentially a proliferation of professional advisors; one to deal with it in a narrower role, and one who may get access, and one in a different role who can't get access. So it becomes much more costly.

But I don't understand how you're saying okay for lawyers, but for a committee member's lawyer, but not if that lawyer is using a financial advisor to advise them. This is a heavily financial case. I mean, anybody who's going to get it has got to sign on. And if it breached the -- if it turns out that they breached the protective order, there'll be

consequences.

Why lawyers yes, financial advisor, no?

MS. GARDINER: I guess advisors who represent for the receiving -- I mean, the committee members that received the documents are receiving those documents in their capacity as committee members and not as individual. So I'm not sure I agree that paragraph (b) would allow disclosure to the -- I'm looking at 6(b) -- would allow disclosure to the lawyers. I just -- I'm not sure I agree that individual lawyers -- individual committee members' lawyers get access either.

(Pause)

THE COURT: Any other points you want to make?

MS. GARDINER: Sorry?

THE COURT: Any other points you wish to make?

MS. GARDINER: I guess sort of the third problem we have is well, one just procedural point. In the examiner's motion he indicates that parties will produce documents on a rolling basis and accounts for that. We just ask that the order be revised to reflect that as well, that both the documents can be produced on a rolling basis, starting ten days after the receipt of a subpoena. And also that privilege logs be similarly produced on a rolling basis, as the documents are produced. That was a purely procedural point.

But I think the third issue we have is just the use restriction. And I think this ties into our concern about the

broad access. I mean, the sort of big concern would be that a third party who's shown no entitlement as required under Rule 2004 to the materials, gets access because of their membership in the special service list, then is able to use -- so long as they can say, in some form, that they're using the documents in connection with the cases, they can use them. We would ask that the use be restricted to in connection with the investigation.

THE COURT: Yes. I want other parties to address that issue. That -- I'm not ruling on it yet, but I'm sensitive to this issue of who has access and that the designation of the special service list was never intended to and doesn't link to the examiner's materials that are being collected. It's one thing if someone -- an additional party not included originally makes a motion for access and shows good cause. So -- but I want to hear others speak to that issue. So I have that -- that point, I have clearly in mind.

MS. GARDINER: Okay. Well and again, as sort of tied in with that, is this broader concern about use. And the two are related. But also, we would ask that the materials be -- the use of the materials be limited to in connection with the investigation.

THE COURT: I don't know what that means either. I mean, that's not the purpose of the examiner. Okay? The examiner's going to do a report, and it's going to provide

information for the parties to use in connection with these Chapter 11 cases. Other parties are not conducting the examination. The examiner is conducting the information (sic). Why is the examiner conducting the information (sic)? Because the requisite showing for appointment has been made. There are clearly matters that everyone agrees on the appropriate scope. The examiner will report on it.

And I understand the need -- I understand the parties' desire that the materials only be used in connection with this Chapter 11 case. When you want to add that additional qualifier, I don't know what it means as a practical matter.

But let me hear from other parties. Okay?

MS. GARDINER: Okay. Thank you.

THE COURT: Thank you very much.

Let me see -- does the committee want to be heard, and then -- Mr. Seife, I'll give you a chance. And I do have some more questions as we go along.

MR. ECKSTEIN: Your Honor, good morning. Kenneth Eckstein of Kramer Levin, on behalf of the creditors' committee. A couple of observations. I'm not sure there are that many points that need to be dwelled on.

But I do want to point out that we saw the limited objection from Cerberus Tuesday night, and I believe we saw a more limited objection from Ally, I think it was Wednesday morning. We actually had understood that this was actually

agreed to. So I was a little bit surprised that there were such significant disagreements, and I'm not sure I'd characterize the Cerberus objection as limited.

So we didn't have an opportunity to put any response in, but I do want Your Honor to appreciate that this protective order was the result of extensive negotiation, not just with the committee, but with the debtor and with other parties. And it took a lot of compromise to get to this.

Number two, I do feel a need to point out that the committee already has in place a confidentiality agreement with Cerberus. On July 12th, Cerberus executed a confidentiality with the committee. And the protective order essentially builds off of the confidentiality agreement. And I'm a bit perplexed, because the provisions that are being discussed now, are already included in an executed confidentiality agreement.

For example, "professional eyes only" was lifted out of the confidentiality agreement and goes into -- and again, that was negotiated. It was not just submitted to Cerberus; Cerberus negotiated it. It was agreed to with the debtor; it was agreed to with Cerberus; and I believe it was agreed --

THE COURT: I think they're trying to retrade it now.

MR. ECKSTEIN: Well, I think that's probably one way to look at it. There was no "highly confidential" concept in the confidentiality agreement. The examiner wanted to include a provision for highly confidential documents. The intent was

so that the examiner would be able to get -- really, the purpose was to get really legal analysis from the parties about positions that parties did not want to share broadly. And we frankly understood that. And to the extent that counsel for one of the parties wanted to share legal analysis with the examiner, we frankly felt it was appropriate for the examiner to be able to see that without that going into the depository.

My concern is that that even now, the "highly confidential" definition, as Your Honor pointed out, goes beyond that. And we are, in fact, quite concerned, that even what's in there now, the competitive harm, for example, if -- it could go awry. And we are relying on the good faith of the parties not to take advantage of that provision. It's been represented by everybody that it's going to be used most narrowly. And I'm concerned.

Candidly, Your Honor, we have asked for a log. We have asked anybody who wants to submit highly confidential information should provide a log of what that is, because we're not going to know what's even in the category. There is no log right now in this agreement. And frankly, I think there's good reason for if a party wants to designate something as highly confidential, they could submit a log to the examiner and simply let everybody know these are the documents that we're submitting as highly confidential. Obviously, don't disclose the info.

But that way, we'll have a better sense of knowing whether or not, in fact, the narrow use of that provision is being respected. And we think that that would not be burdensome, and would actually be a very reasonable way for everybody to keep track of how that's being used.

But we would have strong problems with expanding "highly confidential" even beyond where it is now. We're living with where it is now, in order to get this done. But we would object to expanding that provision.

In terms of the financial advisor issue, that was negotiated and is in the confidentiality agreement. I mean, it specifically says that if a financial advisor for a committee member is only working on the Chapter 11 case and is not working with the committee member on anything unrelated to the Chapter 11 case, then it was agreed that that financial advisor could see the professional eyes only information. And that's simply what the protective order says. So I'm not -- I don't understand why that's even objectionable.

And as a practical matter --

THE COURT: I don't either.

MR. ECKSTEIN: So I don't believe that there's any basis for that to be modified. And in terms of the use issue, Your Honor, I will tell you that I have had extreme difficulty with my clients who are very concerned that this protective order could potentially be used as a source for procedural

litigation against them to suggest that you're sitting in the room, you're hearing a presentation from counsel on documents that are confidential, and that's going to somehow be used to hold up or distract ancillary litigation, on the grounds that they have access to information.

We all know, if somebody hears the information, they hear the information. It doesn't mean that they can take a document that's confidential and annex the document to a pleading. I think people understand that. But I think it should be made clear on the record that committee members who have fiduciary duties and are basically involved in this Chapter 11 case, should not be subjected to procedural litigation arising out of this order because they have received confidential information in the course of their duties as a member of the committee.

And I think that that is an important clarification on the record. I don't think we need to modify the document. But we would have strong concerns about further modifying the use beyond "in connection with the Chapter 11 case", which we think is the appropriate definition. And we share the view that this protective order is being proposed very broadly, and it's going to affect -- according to Ally, Ally would like this to cover all discovery in the case.

So by definition, if it's going to cover all discovery in the case, which is something that we haven't finally settled

on, but I know that that's their request and that may, at the end of the day, be appropriate; all the more reason why it has to be -- this has to be constructed in the broadest possible framework, rather than the narrowest possible framework.

I'm not going to comment, Your Honor, on the first point, which is the access of parties. I understand the examiner would like to maximize the possibility that this report can be filed broadly. We concur with that. We think that that is a very important goal. We think it would be disadvantageous if the examiner is compelled to file a report that people can't read. And so whatever needs to be done to allow the examiner to file its report with as much publicity as possible, once it's complete --

THE COURT: Let me interrupt you for this purpose. I'll make clear to everybody, in most matters where I've approved confidentiality agreements, both when I was practicing law and since I've been here approving them as a judge, where it deals with discovery material -- and yes I see agreements, and I approve agreements that have "professional eyes only", "highly confidential", "confidential". I've got a file with agreements that people have seemed to want to draft.

And unless and until it gets into an issue about what's going to get filed in court, I'm not overly -- I don't give people a really hard time about what's in it; because I figure, all right, let them -- let's move this along, get this

done. But when it comes to the issue of what gets filed in the public record, the examiner's report, don't think that because something that I've approved a confidentiality agreement, that that necessarily is going to carry forward to what gets made public in the examiner's report.

Yes, people will have an opportunity to, before it's public, if they think that something that was based on what was designated as "highly confidential" or "professional's eyes only", I'll give them a chance to be heard on it. But don't assume just because I'm going to approve the confidentiality agreement, that the examiner's report -- the examiner is going to be precluded from doing a report that relies on confidential information. That isn't going to happen. I'll just put everybody on notice of that right now. It defeats the purpose of having an examiner's report, in my view.

MR. ECKSTEIN: And, Your Honor, that is the way we're looking at this as well. We are expecting that once the examiner's report is filed that -- I don't want to say necessarily most, but many, many of the documents that have been designated confidential will become public. And the use issues will drop away, and that this is really governing how the parties are operating over the next couple of months, until the report is published. But we're assuming that this report is going to cleanse most of this information, so that we're not going to have use problems and restriction problems on most of

these documents, going forward, once the report is published. And that's how we're approaching this as well, Your Honor.

In terms of the first point that Mr. Seife discussed with Your Honor regarding the document depository. I think the modification that was suggestion, which is "subject to the Court's order," is the appropriate way. But as a practical matter, I just want to assure Your Honor that the committee certainly was expecting, and we carefully worked this out with the examiner, that every document will be accessible.

We are expecting to take, essentially, those documents into our own possession when they go into the depository, so that we can work with the documents simultaneously with the examiner. And we expect to retain the documents. Which is why we were not as concerned about that. Although, I think, "subject to further order" is probably better.

THE COURT: Look. I'm going to leave it to you all to work out. I just wanted to be sure that this -- the debtors' point is, they only want to do it once. They only want to give discovery once. And I understand that. And I'll talk with -- about that issue, I'll listen to the debtor further on that point.

Is -- I'm looking and I'm searching. I made notes on these objections. Was it Cerberus' objection who thought that it should include any asset sales? You broadened the definition. Was that in Cerberus?

MR. ECKSTEIN: Yes, that was -- the Cerberus objection wanted to include any asset sale, which we thought, frankly, made no logic in this --

THE COURT: Tell me why?

MR. ECKSTEIN: The entire investigation is about the asset sales. It's -- everything is going to involve transfers of the debtors' assets. And that goes to the heart -- that will swallow up every single component of the investigation. That was, in our view, probably the most difficult edit to justify, in our mind. And we would oppose that, Your Honor, because that would turn everything into, I guess, professional eyes only, or highly confidential. I don't recall which provision it was in. But it was not acceptable, from our perspective.

THE COURT: All right. Thank you, Mr. Eckstein.

MR. ECKSTEIN: Thank you, Your Honor.

THE COURT: Who else wants to be heard?

MR. BRYAN: Good morning, Your Honor. Patrick Bryan, Kirkland & Ellis, on behalf of Ally Financial.

Your Honor, following up on the issue of access, we do share Cerberus' concerns with access to this confidential material. In particular, in our limited objection, we requested that there be a provision expressly prohibiting use outside of these Chapter 11 cases. And for us, Your Honor, this is a very real concern.

Members of the committee have initiated litigation, and that litigation is ongoing against Ally as well as the debtors, or there have been threatened litigation by committee members. So for us, the restriction that this information, this confidential and professional eyes only information, remain in this Chapter 11 proceeding only, is a very real concern to avoid potential prejudice by parties obtaining access to materials that they would not otherwise have access to in the underlying litigation.

Your Honor mentioned FHFA. That case is not stayed. And that --

THE COURT: I know that.

MR. BRYAN: -- case is obviously continuing in discovery. They could very well be before Your Honor seeking to use the document depository as the equivalent of the body of water to conduct a fishing expedition for further claims. And we think that it is essential for Ally to have that be expressly prohibited, and we'd ask that the order be modified in that respect.

Now, Mr. Eckstein mentioned the possibility of procedural litigation against committee members if they have access to information in their role as committee members. And I'm not sure I understand that concern or whether it's legitimate. But as committee members, they only have the right to access confidential information within this Chapter 11

proceeding. So we respectfully submit, Your Honor, that that concern should not be given much weight.

Now, Your Honor, we have also raised another issue with respect to the scope of the protective order. I'm happy to address that now, if you like.

THE COURT: If you're going to do it, now's the time to do it. Let me just -- hang on just for one second, because I made some notes on your -- go ahead.

MR. BRYAN: Your Honor, in our limited objection, we made the simple request, let's make this protective order apply to all discovery, whether it be conducted by the examiner or the committee. And we suggested at the very beginning, in fact, in the discussions with the committee, that that was our position from the very beginning, that this should be a uniform protective order applying to all discovery.

And the examiner, in his papers, has acknowledged that it's critical to have a uniform, single, protective order. And we agree. We just think it should be extended to all discovery. And the reason is, because as Mr. Eckstein mentioned, the committee has conducted discovery. We have produced documents. And they've asked us to enter into a bilateral confidentiality agreement.

Your Honor's 2004 order requires us to produce the documents we give to the committee to anybody else, subject to the committee's 2004 motion. That means there are several

bilateral confidentiality agreements that would be necessitated if this protective order is not expanded in scope to cover committee discovery. That's exactly the situation the examiner is trying to avoid, and that's exactly the situation we're trying to avoid.

And Mr. Eckstein mentioned the confidentiality agreement that the committee has entered into with Cerberus. They proposed a similar confidentiality agreement to us. And there are differences between that proposed confidentiality agreement and the protective order that the examiner has proposed. For example, the definition of "professional eyes only" is different between the two agreements. There are different designations. There are different protections in the examiner's proposed --

THE COURT: It's become a cottage industry, preparing protective orders.

MR. BRYAN: Your Honor, and we are not -- the only thing we are interested is let's do this efficiently. Let's make it so that the committee's work and the examiner's work is not frustrated by these -- what should be very resolvable and administrative matters. We have proposed simple language.

THE COURT: Have you entered into a protective order with FHFA, with respect to Ally documents and the litigation before Judge Cote?

MR. BRYAN: We have, Your Honor. Well, we have not --

let me rephrase that. Judge Cote has entered her protective order in that case, yes. Obviously --

THE COURT: And how does it differ from the proposed protective order here?

MR. BRYAN: Your Honor, to be honest, I have not reviewed that and I can't answer that question. But what I can address is the differences between what the committee has asked Ally to do in this case and what the examiner has proposed.

THE COURT: Well, I sort of share Mr. Seife's view in the short reply. This is -- I'm not going to hold this up while people sort out what they're going to do. I'm going to approve a protective order. It makes perfect sense for people to sign onto it when they're asked to produce documents; but I'm not going to hold this up.

If the issue comes before me when someone is objecting to producing documents to another party without a protective order, the first place I'm going to look is the protective order that gets entered here. But go ahead.

MR. BRYAN: Your Honor, and we don't want to hold this up either. In fact, as I mentioned, we engaged both the committee and the examiner, proposing language. And the committee indicated that they -- although they don't think our request was necessary, they don't oppose the change that we offered. The examiner, in his papers, took the position that we don't have a position on this.

I think this is something that we can resolve here today, Your Honor. It is something that will improve efficiency; and that we shouldn't be here arguing about this issue. We should be moving forward in discovery. And that's what we intend to do. In fact, Ally has produced documents to both the examiner and the committee, without entry of a protective order, to keep the process moving. And we submit that having a uniform protective order govern all discovery, will avoid the next time Your Honor has to address protective order issue, or the next time a party that's not on the service list comes to you and says I want some different protections. We can do this all at once, Your Honor. And we think now is the time to do it.

THE COURT: Thank you.

MR. BRYAN: Thank you.

THE COURT: Anyone else want to be heard?

MR. MOLONEY: Good morning, Your Honor. For the record, Tom Moloney of Cleary Gottlieb Steen & Hamilton. We represent a large number of the senior unsecured noteholders of ResCap. Actually, we've negotiated successfully a form of instruction letter to Wilmington Trust, and a form of indemnification letter with Wilmington Trust, and a form of verification with Wilmington Trust. And I suspect the next time we appear before you, we'll be appearing as special counsel to Wilmington Trust. So I think that's what will be

next.

And we obviously want to participate in this discovery. And there's a placeholder for us now under the special designation list. There's also a placeholder for us to participate in the depositions as an ad hoc group which will be changed to --

THE COURT: What's the big deal if -- I'm concerned by the category of special service parties, because it was never intended to be linked to access to an examiner's depository. As long as whatever I sign establishes a procedure that allows you -- you may well be able to establish good cause for access to it.

MR. MOLONEY: Right.

THE COURT: I start with a strong preference that parties-in-interest be given access to as much information as possible. There may be reasons why some party should not be, or certain kinds of information that they shouldn't be. But I'm not sure -- yes, it will be one more motion that has to get added to an omnibus hearing day, when you want to obtain access to the examiner's depository. But okay.

MR. MOLONEY: Well, Your Honor, we were part of the group who negotiated this order, so we actually -- if language doesn't change, we're okay with the order as is. There have been requests for changes, and I'm going to suggest that changes are not merited, because there's already a mechanism in

place here. You don't automatically get information just because you're on the special service list. You have to step up and sign this protective order. Presumably you're then going to have to give notice. And if you don't have to give notice to all parties who are producing here, you should. And then if somebody has a problem and says, look, I'm involved in another litigation with this party, and it's not appropriate for them to be getting this information, or they're not really a party-in-interest, they can -- they should be able to raise it.

So I think the burden should really be on the party who says look, presumptively the people on this list are parties-in-interest in this case. And to require all of them to --

THE COURT: Yes, but there's no -- I don't have any --

MR. MOLONEY: -- file --

THE COURT: At this stage, there's no -- I don't have any control about who gets added to this special service list.

MR. MOLONEY: Correct. But until they actually sign on to the protective order -- and you could build in a mechanism where they give notice -- they're not getting the information. So it's not going to all of these -- and if they sign on to the protective order, then I think it should be the burden of the parties who think they're an inappropriate party rather than having people constantly filing motions before Your

Honor to get onto this list. I think the presumption should be, given where we started --

THE COURT: That's what I don't see, Mr. Moloney. I don't understand -- I'm being very candid -- I don't -- the category wasn't created with this in mind; why it should be given a presumption now that it's to be given broader use, other than making somebody's life easy, perhaps, it's not clear to me.

If you want access to the documents, having to make a motion, I don't think is a particularly onerous burden to put on you. And you may well be able to establish good cause to do it.

MR. MOLONEY: Well, Your Honor, can I make two points about this?

THE COURT: Yes, go ahead.

MR. MOLONEY: One is that there have been two suggestions to expand the whole scope of this, one by the debtor that this is the exclusive avenue to get information. And representing the noteholders, we'd asked them for information, and they've told us, no, it's all going to be given through the depository. We don't want to have to produce information collaterally.

THE COURT: Well, look. Let me stop you there, Mr. Moloney, because actually, that was one of the things I wanted to ask the debtor about. I mean, the debtor shouldn't have to

be able to produce the material twice. But what is not clear to me, whether if this is an electronic database, it does seem to me that the debtor could say -- I would assume that access could be provided such that if the debtor says just get all the documents that we've produced and that's on the examiner's database, that you could obtain -- that rather than the debtor have to produce it again, that you could get -- they could say, just go to the examiner's database. You've got the authority to do that. There ought to be a mechanism built in, just for that purpose, so that their response could be, it's all there, take it from there. But that doesn't mean you get access to every other party who has produced documents to the database.

So when I read it, that's what I envisioned happening; that no -- the debtors shouldn't have to be able to go -- have to go through this multiple times, but there ought to be a way to be able to retrieve from the examiner's database, documents produced by the debtors, even if you didn't have access to Cerberus' documents, just as an example. What's wrong with that?

MR. MOLONEY: We have no problem with it, provided that you're not in a situation where you have an exclusive source to go to to get information, which is the database, and you'd be entitled to get that information vis-a-vis the debtor, but because of some other procedure, that we've set up here, you can't get to the database. That --

THE COURT: Well, one of the things --

MR. MOLONEY: -- Your Honor may have fixed that in your suggestion.

THE COURT: I want hear from Mr. Seife. I don't want to create problems for Chadbourne on this, but -- or I don't know where you get a vendor who's going to be the keeper of this database. But so I won't -- I mean, I don't think that logistically it creates a big problem to say that the debtor can provide the authority for someone, some party, to access the documents produced by the debtor that reside on this database. It may raise an issue about cost. And that ought to be discussed as well.

But that seems to me to be -- because Cerberus shouldn't have to produce documents twice. Ally shouldn't have to produce documents twice. But it may be that there are some parties who will gain access to Ally's documents. And their answer is, we produced it once; you can get it off the examiner's database. We will give written -- we'll sign a written authorization for you to have access to the documents we produced.

MR. MOLONEY: Your Honor, I think there's -- I think the only question I have of where I think this is coming out is that I think there should be a very strong presumption that parties-in-interest in this case get access to this database.

THE COURT: I'm not so --

MR. MOLONEY: I mean, the Enron case, which I was involved in, before Judge Gonzalez, it was a situation where someone is trying to do an end-run around a PSLRA which doesn't permit discovery, to get discovery in a 2004 proceeding. And also there's a rule that once you start a lawsuit you can't get both --

THE COURT: You can't use 2004 as a substitute.

MR. MOLONEY: But the most -- for representing the bondholders in this case, we don't have any lawsuits, we don't have any securities cases. There's no reason why we should not have full access to this information.

THE COURT: Okay.

MR. MOLONEY: I can't imagine -- and I think that's true of every party-in-interest and creditor.

THE COURT: Because I don't want to have to go through and I don't want everybody else to have to go through now and say who's on this special service list now, how did they get on there, how does that relate to --

MR. MOLONEY: It may not be a good --

THE COURT: -- this use --

MR. MOLONEY: It may not be a good rubric. It may be, Your Honor, that a better rubric would be for them to come up with a new definition that it includes --

THE COURT: My approving something now, Mr. Moloney, doesn't preclude an amendment to this if the parties -- I want

to come out today with perhaps some minor tweaking with what these orders are going to be. And it does not preclude further discussions to try and tweak it so you can satisfy Mr. Lee that the debtors don't have to produce more than once and how that access -- that could be done with a separate order or something of that nature.

MR. MOLONEY: Right. We agree with that, Your Honor, not to hold up the examiner and that issue of whether it be a single protective order for all purposes or whether -- how the debtor avoids that --

THE COURT: It would be better --

MR. MOLONEY: -- for a later day.

THE COURT: -- for everybody if it was a single protective order for all purposes.

MR. MOLONEY: We agree with that as well, Your Honor, but we think that people have to -- maybe a broader group of people need to be involved in looking at this, and it should be teed up separately if that's the objective. Then I think the --

THE COURT: Well --

MR. MOLONEY: -- first objective is to get --

THE COURT: -- putting in the protective order "unless otherwise ordered by the Court this is what's applicable" --

MR. MOLONEY: But --

THE COURT: -- would also be --

MR. MOLONEY: -- can I make a very parochial request, that if we just come out with an order today that it include, basically, Wilmington Trust as the indenture trustee for the bondholders, because we have been involved, we do expect we're going to end up being counsel to them within a day or so and we have been involved in negotiating this for three weeks, and I think it would be unfair for us to be kicked out of this process and have to come back again. I don't have any doubts Your Honor would allow us back in again, but I think as a matter of economy, I think we should --

THE COURT: All right. I hear your arguments.

MR. MOLONEY: Thank you.

THE COURT: Thank you.

Anybody else want to be heard?

Mr. Shore, you want to be heard?

MR. SHORE: Very quickly, Your Honor. Chris Shore from White & Case on behalf of the junior secured notes group.

I just echo the same concerns. The status quo forty-eight hours ago was we were getting the information, and now we're not. And I think that the concern Mr. Moloney was raising was that the cut that was made in the Cerberus objection ended at the creditors' committee and kind of disenfranchised the other larger groups within the case, obviously, who have either a collateral interest in the claims that are being investigated or obviously a recovery interest

that the people are willing to invest money in to analyze.

So I would make the same request that we be included or we could, while the order is being negotiated, get put in, because I'd hate to just have to come back and address that motion.

THE COURT: Let me ask, Mr. Bryan, do you have any objection to -- and I'll ask Ms. Gardiner as well -- do you have any objection to the junior secured noteholders and -- Mr. Moloney, just tell me again how you designate who your parties are.

MR. MOLONEY: Wilmington Trust, the indenture trustee for the senior unsecured notes. That would be fine.

THE COURT: All right. Does anybody who has filed limited objections object to those two groups being specifically included?

MR. BRYAN: Patrick Bryan on behalf of Ally Financial. Your Honor, we don't object to those specific entities, with the same caveat that we'd like a provision that it expressly is for these cases only.

MR. HARRIS: Your Honor?

THE COURT: Mr. Harris?

MR. HARRIS: Your Honor, Adam Harris from Schulte Roth on behalf of Cerberus.

Your Honor, we don't have an objection either. I just want to note for the record, however, that we are going into

this under the impression that the investigation is being conducted by the examiner for the purposes laid out in the order appointing the examiner. We have a lot of parties-in-interest here. We have a lot of people with a lot of parochial interests here. We expect the examiner to be the one --

THE COURT: Are you surprised?

MR. HARRIS: No, not at all, Your Honor, and I'm not surprised that people would love the opportunity to go through what could be millions of pages of documents, and I wish them well and have a nice day at it. But the purpose of the investigation, as we understood it, was for the benefit of the estate, review various causes of action and come up with an objective and independent report on that.

THE COURT: Would you like to fight discovery requests from all of these other parties?

MR. HARRIS: No, Your Honor, and that's why I started off by saying we don't object to them participating, but the participation and having access to the documents is, in my view, very separate and distinct from the responsibility of the examiner to the do the examiner's job, which we expect will be done appropriately.

THE COURT: Thank you, Mr. Harris.

All right, anyone else?

MR. CORDARO: Good afternoon, Your Honor. Joseph Cordaro, Assistant United States Attorney on behalf of the

United States.

I would note also that the United States, I believe, is also on the special service list and --

THE COURT: They don't want you to get access, Mr. Cordaro.

MR. CORDARO: Well, actually, we're not sure, Your Honor. We would like to try to find that out. If that's an issue then we'd like to be involved in any discussions that ensue after this order. But if there is no objection --

THE COURT: Well, Mr. Cordaro, if -- I'm going to listen to Mr. Seife on this, and I'm not sure he had, really, a dog in this fight either, but I think the special service list is too broad a designation, okay, because it wasn't created for this purpose. The other mechanism, and it's already there, is that anybody else can move, make a motion, and for good cause will get access. So whether you're included initially or not, yes, it may mean that you have to make an additional motion. I don't want to hold this up, because I suspect there'll be another long -- there'll be a line behind you seeking to be added on.

I understand your point and you may well -- I'm just not addressing whether you should or shouldn't be given access to the material. That's not -- okay. You're on the special service list. If that were the designation, yes you'd have access to it. But I think it wasn't created for that purpose

so it's not sufficiently linked. Okay?

MR. CORDARO: Okay. Thank you, Your Honor.

THE COURT: Thank you, Mr. Cordaro.

Mr. Seife?

Is there anybody else who wanted to be -- I think not.

MR. SEIFE: Howard Seife, Chadbourne & Parke, for the examiner.

On a variety of points. Regarding ongoing access to the depository, certainly the special service list is a very arbitrary list and isn't linked in any way, necessarily, to parties who should be getting access. It was just an attempt by the examiner to not be in the position of making that determination, as Your Honor can well appreciate. So we are perfectly happy --

THE COURT: I'm going to sustain the Cerberus objection to the access to the special service parties. I think they had indicated -- specifically identified the parties who should have access. It's been agreed as to two additional parties. There has to be some -- that ought to be it for now. I want to make clear that my preference is for broader rather than narrower access, and so parties who make a motion, I'll hear it and decide it quickly.

MR. SEIFE: Your Honor, in fact we have built in a mechanism.

THE COURT: I know you did, and it's fine.

MR. SEIFE: And the mechanism doesn't require each party to come and make a motion, which I think would have clogged your docket. And it's --

THE COURT: Where is that?

MR. SEIFE: -- in the order on page 5; its subparagraph (h). And it's taken from a similar provision we used in the Tribune case; we represent the committee there. And I would note, in Tribune we started with a very small group getting access, of five or six or seven --

THE COURT: What page are you looking at?

MR. SEIFE: Attached to our motion is the proposed --

THE COURT: Yeah.

MR. SEIFE: -- order, Exhibit A.

THE COURT: Oh.

MR. SEIFE: And page 5 --

THE COURT: I was looking at the wrong --

MR. SEIFE: -- it's single-spaced paragraph (h). Everybody, am I describing it --

THE COURT: Yeah, I did read it and --

MR. SEIFE: Okay. So there is a very detailed --

THE COURT: -- it was hard because all this was single spaced and there's --

MR. SEIFE: Yeah, usually single-space you can flip over, but it's a fairly detailed process which has worked in other cases.

THE COURT: Okay.

MR. SEIFE: As I said, in the Tribune, we ended up with dozens of people that gained access. And what it does is a notice has to be given to the various parties that have deposited documents. And absent -- it's a negative notice, so absent objection a party will get added to the list. So I think that's an efficient way to go.

THE COURT: I agree.

MR. SEIFE: And we're only before Your Honor if there is a legitimate dispute. That's number one.

Are we all clear on who the initial accessing parties are? It's the debtor, the committee, Ally. I'm not sure I heard Cerberus.

THE COURT: Is it Cerberus? No? No, okay, not Cerberus.

MR. SEIFE: No, it's not Cerberus.

THE COURT: Okay.

MR. SEIFE: They weren't on their own list.

THE COURT: Right.

MR. SEIFE: And then the two additional parties that appeared before Your Honor.

THE COURT: Okay. Some other questions, Mr. Seife.

MR. SEIFE: Yes.

THE COURT: I didn't raise this before. I'm looking now in the uniform protective order --

MR. SEIFE: Yes.

THE COURT: -- paragraph 10 on page 8, and paragraph 11 on page 9. So there's language about "unless the disclosing party shall have filed a motion with the Court within those five business days after meet and confer to determine that its use of highly confidential designation was appropriate."

The way I deal with discovery disputes is the parties meet and confer, any party seeking the assistance of the Court arranges for -- it's typically a call with the Court. And I don't like discovery motions, okay?

And I'll tell you that -- and usually -- and even saying within five days, ordinarily parties meet and confer, they can't resolve it, they know they can call the Court, they will usually get a hearing that day or the next day. And I don't even want to see letters. It's described what the dispute is, and ordinarily I resolve it right then. If, after listening, I conclude that I need something in writing, it's usually short letter briefs.

I mean, I can tell you in the last five years, there have only been two or three -- first off, when people know their judge is going to decide it immediately, usually it gets resolved without ever having to go to the judge. And I've only asked for letter briefs in two or three matters, and even there it's gotten resolved within a day.

So what you ought to -- if you don't have -- there

must be in this case management order in this case, there's language about dealing with discovery disputes. What I'm focusing on is sort of in the middle of paragraph 10, "Unless the disclosing party shall have filed a motion with the Court shall meet and confer and shall have requested a conference with the Court." Take the five days out, and I'll tell you right now, it's ordinarily going to be that day, the next day. And in something like this, if it involves highly confidential documents, somebody's going to have to deliver copies -- promptly deliver copies of the documents for the Court to look at, and I'll decide. So that was in paragraph 10. And also --

MR. SEIFE: Paragraph 11.

THE COURT: -- paragraph 11.

MR. SEIFE: Yep.

THE COURT: Let me see whether there were any other little notes.

All right. So with respect to access, I've sustained the Cerberus objection, and I think you'll craft -- it's not a big language change as to what'll be done. And I agree, the mechanism you built into the order is certainly satisfactory for adding additional parties.

Just, Mr. Seife, address this issue about whether it should include asset sales in the "professional eyes only" category. This was the -- Mr. Eckstein, I think, spoke pretty vocally, strongly about -- in opposition to it. What's the

examiner's view about it?

MR. SEIFE: I can only echo Mr. Eckstein's comments. One of the primary focuses of the examination will be on these many transactions which were between the debtors and Ally, debtors and Cerberus. And we need to be able to have full access and use of those documen --

THE COURT: Well, you would have full access, but --

MR. SEIFE: Yes.

THE COURT: The objection is overruled; that specific objection is overruled.

MR. SEIFE: There was another objection, Your Honor, that it was not clear of the use of the information. I think it's quite clear. Again, it's set forth in the protective order on page 4, paragraph 3(b), that any confidential information is to be used for any purpose other than in connection with the Chapter 11 cases. So I'm not sure I even understood the --

THE COURT: I've already made the point, I didn't understand this -- I don't know what this change -- what havoc this change would work.

MR. SEIFE: Right.

THE COURT: So that objection is overruled. I think the language you had was appropriate. Okay.

MR. SEIFE: Then the concept of "highly confidential information". This category was specifically to enable parties

to share with us legal memoranda, legal thinking, that otherwise they would be uncomfortable sharing. So that category will not be published and is solely to educate the examiner and his professionals. So we would strongly resist any attempts to expand that category. And similarly, professional eyes only, I think competitive harm is a standard in that type of category.

THE COURT: Yeah, my comments before, I think taking the word "competitive" out makes this completely open-ended, so that objection is overruled as well.

And also the objection with respect to further limiting who has access to the professional eyes only, excluding the financial advisors, that objection's overruled as well. I mean, the professional -- the financial advisors have got to sign the confidentiality agreement --

MR. SEIFE: Yes.

THE COURT: -- and agree to be bound.

MR. SEIFE: In the course of that discussion, Your Honor, it did seem to me there was a gap that would permit the attorneys for committee members to have access to the information. For some reason they did not seem to be included, so we would amend that, because I think that was the understanding.

THE COURT: Okay. All right.

Were there any other -- let me see, were there any --

I tried to keep track of what --

MR. SEIFE: The suggestion that parties that produce highly confidential information need to produce logs, Your Honor, we think that's unduly burdensome. The examiner will know what's highly confidential because it'll be stamped. So I don't -- and it would just be a log on what was being produced to us. I don't think that is necessary. I don't think we need other parties --

THE COURT: But you know --

MR. SEIFE: -- looking over our shoulder.

THE COURT: -- anybody who's going to produce the documents is going to create a log, and a field on that log that lists whatever has been marked as highly confidential, is there any burden in that?

MR. SEIFE: Well, I think the suggestion was that it would be made public and accessible to other parties to the depository. The examiner doesn't need it --

THE COURT: Okay.

MR. SEIFE: -- and we would resist --

THE COURT: All right.

MR. SEIFE: -- publicizing that.

THE COURT: Okay.

MR. SEIFE: I think that was --

THE COURT: I'm going to overrule that objection, then, as well.

MR. SEIFE: Thank you.

I don't think I had any other issues that we needed to treat at this moment.

THE COURT: Ms. Gardiner?

MR. LEE: Your Honor, may I --

THE COURT: Yeah, come on, Mr. Lee. I'll give you a chance. Go ahead, Mr. Lee.

MR. LEE: Your Honor, I thought I was going to get away without having to say anything, but unfortunately the clarification that Mr. Seife just made in relation to the provision of "professional eyes only" information to committee members' attorneys was a very heavily negotiated point when we had this discussion with the committee, and the protective order is based on the same protective order that we had proposed with the committee.

The difficulty we have is that those same attorneys are representing those parties in respect of claims that they have against the estate, and the purpose of our providing professional eyes only information to committee counsel and to the examiner was to educate them about things that ordinarily we wouldn't produce because they're privileged or work product. So I'm quite concerned about now expanding the category of people who get professional eyes only information to committee counsel. So --

THE COURT: Counsel for committee members.

MR. LEE: -- committee members' counsel. And we spent a long time negotiating that point. So that clarification causes us quite a great deal of concern, Your Honor.

THE COURT: Mr. Eckstein, can you address whether -- was that something that was agreed between -- because this really doesn't affect the examiner because this is not -- you don't have a --

MR. ECKSTEIN: Your Honor, I think the concern Mr. Lee was referring to was committee counsel for individual members who were involved in ancillary litigation. So it would seem to me that to the extent they're involved in ancillary litigation that it would be appropriate for them not to have access to the PEO information. Those who are not involved in ancillary litigation, I would think that those are similar to the financial advisors who are not involved in the ancillary litigation. And that might be the --

THE COURT: Mr. Lee --

MR. ECKSTEIN: -- the right way to --

THE COURT: -- do you agree with that?

MR. LEE: I agree --

THE COURT: Okay.

MR. LEE: I agree with --

MR. ECKSTEIN: I think that type of demarcation makes sense, Your Honor.

THE COURT: Okay. So I was going to say something,

but I can see people are jumping up --

MR. LEE: I apologize, Your Honor.

THE COURT: No, go ahead. People are jumping up behind you, but --

MR. LEE: That was the only point I had, Your Honor.

THE COURT: Let me ask you, Mr. Lee, with respect to the point in the brief piece of paper you filed about not producing things more than once, I mean, that seems to me to be quite manageable, but maybe it's more Mr. Seife's point because it's more of a complication if he and his professionals are maintaining the database. But I would assume that -- and I don't know that it has to be in this document, but something that allows a party who has submitted produced documents to the depository to consent to their production to someone else. Does that solve your problem?

MR. LEE: It does, Your Honor. And I think actually the way it's described in the form of order that Mr. Seife admitted is perfectly acceptable to the debtors.

THE COURT: Okay.

MR. LEE: Thank you, Your Honor.

THE COURT: All right. Mr. Bryan, you had something you wanted to raise?

MR. BRYAN: Your Honor, I think it may be resolved, if I understand correctly, that Ally would be given an opportunity before -- to object before the information is shared with the

committee members' individual counsel. Is that correct?

THE COURT: Yes, that's the way you had it. You're going to clarify that language, right, Mr. Lee and Mr. Eckstein?

MR. ECKSTEIN: Just so we're not confused, I think this is only with respect to the professional eyes only category, and we're going to clarify that language as I just put on the record.

THE COURT: Mr. Bryan?

MR. BRYAN: That's correct, Your Honor, with that change. The issue for us, obviously, Your Honor, is that there may be ancillary litigation, as Mr. Eckstein referred to, or there may be tolling agreements that it has not yet been brought. So it's an essential we have an opportunity to object. Thank you.

THE COURT: Okay. But we're only talking about the "professional eyes only" material?

MR. BRYAN: Yes, Your Honor.

THE COURT: Okay. Ms. Gardiner?

MS. GARDINER: Thank you, Your Honor. I just want to quickly address our proposed modification on Romanette ii, paragraph 5, regarding professional's-eyes-only. When we suggested this language or transferred the debtors' assets, we didn't intend to swallow up every prior transaction, we just meant debtors' current assets.

THE COURT: No, I --
MR. SHORE: I just wanted to --
THE COURT: -- overruled your objection.
MS. GARDINER: Okay. Okay, thank you.
THE COURT: Anybody else wish to be heard?
Mr. Seife, is it clear to you what's going to happen now?
MR. SEIFE: The only clarity that I perhaps don't have fully, Your Honor, is, taking the debtors as an example, the debtors will be producing documents to us; they'll be putting it into the depository. The debtors, when they produce, will have, in electronic form, everything they produce. So if a third party wants to see what they've produced, it doesn't seem to me to be particularly burdensome for them to reissue what they've delivered to us. My concern is putting additional burdens on running the depository in terms of segregating information by the parties who produce it.
THE COURT: I assume everybody's going to have unique Bates numbers, though, on anything they produce.
MR. SEIFE: It all sounds very easy, but I'm not the one running it. And then we'd also have to monitor who has permission to get access to that limited database. Right now it's being set up --
THE COURT: Well --
MR. SEIFE: -- so that it's universal access. So I'm

not sure it's a real problem. We're happy to discuss it further with the debtors. But once you produce something and it's in electronic form, I think you have it. So to send it someone else, I don't think is a burden, but maybe other parties can disagree.

THE COURT: Mr. Lee, what's wrong with that?

MR. LEE: I think, Your Honor -- is Your Honor's question whether we should maintain our own document depository for --

THE COURT: No, but you will. I mean, it's not your -- it isn't a question, because this is only an issue about the documents you produce.

MR. LEE: Right.

THE COURT: Right. You're going to produce them in electronic format.

MR. LEE: Yes, Your Honor.

THE COURT: You absolutely are going to keep an electronic record of what you're producing. Probably papers too, but --

MR. LEE: Yes, Your Honor. That's correct.

THE COURT: The other thing, Mr. Seife's point is what's the big deal? Somebody asked for it. It's easy for you to provide it.

MR. LEE: I mean, I think, Your Honor, I thought the purpose of the depository was to collect in one place all of

the documents relating to the analysis and the investigation. So either they're easily segregatable or they're not, and it would -- we will, effectively, be faced also with situations in which we see Rule 2004 subpoenas being directed to other parties where we're forced to intervene. The thought was this would be clean, streamlined, and effective.

THE COURT: All right. I think you can work this out with Mr. Seife. I don't think that it in any way needs to hold up approval of the order for the 2004 examination, the protective order, or the depository. Would you agree with that, Mr. Lee?

MR. LEE: Absolutely, Your Honor.

THE COURT: Okay. And then to the extent -- I understand your concern about having to produce things more than once. See if you can work this -- I think when the depository actually gets set up, and you ought to be conferring with -- I don't know who the vendor is you're using, Mr. Seife, but talk to Mr. Lee. Hopefully it can be set up in such a way as that it's easily searchable, find by party producing, et cetera. Okay?

MR. LEE: Thank you, Your Honor.

THE COURT: Thank you. Anybody else wish to be heard? I really do appreciate the efforts, Mr. Seife. Obviously there were a lot of interests and concerns beyond just the examiner.

Last comment. With respect to is this going to be the

only form of the protective order for the case, somebody's going to have a very hard time convincing me that something different than this ought to be approved, but because there may be other parties not present in court because they didn't know they were going to get served with a 2004 subpoena by someone, you know, some other party, this clearly applies to what the examiner is doing, I'm reluctant to hand down an edict today: this is it for the entire case. Everybody ought to assume there's a strong presumption this is what it's going to be. Let me leave it at that. Okay?

Anything else you want to add, Mr. Seife?

MR. SEIFE: No, Your Honor.

THE COURT: Thank you very much.

MR. SEIFE: And we'll make the changes --

THE COURT: Okay.

MR. SEIFE: -- and submit an order.

THE COURT: All right. Mr. Eckstein?

MR. ECKSTEIN: Your Honor, if I may, before we leave? I think we've finished the calendar.

THE COURT: We have.

MR. ECKSTEIN: But if it's acceptable I wanted to just briefly made a couple of status report observations --

THE COURT: Okay.

MR. ECKSTEIN: -- on RMBS. Given vacation schedules and the like and the timing I thought it was appropriate to

just use this as a brief opportunity. And I didn't stand up when Mr. Lee spoke initially about the subservicing, but just to make sure I appre -- I think we've left with a status conference on Thursday, and I'm assuming that it'll be set down -- assuming the matter is resolved we'll set it down for a hearing to approve the motion at a subsequent date, which is acceptable to us, Your Honor.

With respect to RMBS, what I wanted to just bring to the Court's attention is that the committee has been laboring quite actively over the last few weeks to put in place the support it's going to need in order to do the investigation that has to be done of the RMBS issues. And it has been a more arduous undertaking than one would have expected, given the fact that many of the experts in this field are already spoken for and there are conflicts that have made it close to -- I don't want to say impossible -- very difficult to identify the experts that will be needed to perform the roles that are required.

I believe that as of this morning we actually have overcome the hurdle and we have in place a series of parties who are going to be able to work with the committee to provide the analysis that we believe is going to be needed in order to review the proposed settlement and the issues that are implicated by that.

Apropos that, I do want to note that last night the

debtor filed an amended 9019 motion with an amended settlement agreement that is quite substantive and raises even more complications, and, obviously, that's going to have to be something that is looked at very carefully, but I do want to underscore the fact that, from the committee's perspective, the complexities of this issue are growing. And, obviously, we're going to do the best we can.

The reason I wanted to speak specifically today, Your Honor, is that the committee is going to be -- the approach that we're going to take is we intend to file a retention application that will cover a consulting firm, a -- basically, a testifying expert from a consulting firm, a group of economists and statisticians who will be working with the testifying expert, and a firm that will be able to assist officially in reviewing samples of loan files that we believe need to be done in order to do the evaluation.

The costs are substantial, just given the magnitude. We hope to have an application on file, I would think, within the next week, and I would expect it can be on the calendar for September 11th, but I do expect that in order to even attempt to grapple with the schedule that is out there right now, a significant amount of work is going to need to be done between now and September 11th. And while I can't prejudge that the Court's going to enter an order, I at least wanted to apprise the Court and the parties that we are going to be engaging

these parties. I have discussed this with the U.S. Trustee and with the debtor. I think they all understand it, but I wanted to do what I can to lay the foundation for the fact that there's going to be work done between now and the middle of September that will be substantial, and our hope is that we can give these parties a reasonable level of assurance that it will be included in what is going to be compensated.

The alternative, Your Honor, would be to simply have my firm engage them, essentially, as experts and to, essentially, present them as expenses, but I thought, given the size of the undertaking and the fact that they are consulting firms that the better practice was to submit the application. But I wanted to at least alert Your Honor to the issue.

THE COURT: When will you be ready to -- has the U.S. Trustee seen applications yet?

MR. ECKSTEIN: Your Honor, the engagement --

THE COURT: It was last night.

MR. ECKSTEIN: The engagement is literally being completed today.

THE COURT: Okay.

MR. ECKSTEIN: So there are no -- we've been vetting conflicts quite extensively, and every time we vet conflicts, new conflicts arise. It's remarkable. But that's neither here nor there right now.

THE COURT: When's the hearing?

MR. ECKSTEIN: Right now there is a hearing, I believe --

THE COURT: Is this the November 5th?

MR. ECKSTEIN: I think expert reports are due beginning of October.

THE COURT: This the November 5th hearing?

MR. ECKSTEIN: November 5. November 15? November 5. I'm not commenting today, Your Honor, on what is achievable. I think Your Honor had suggested when we were last here on RMBS that we should probably (A) that we should have regular meet-and-confers, which we are having, and I would say that a very good schedule has been set up and my office and Morrison & Foerster are working hand-in-hand on this, but I think we probably will need a status report early September with Your Honor to honestly assess where we are. And I don't want to make any representations about an ability to meet that schedule right now, because I think that would be too ambitious.

THE COURT: Well, you're all here on September 11th.

MR. ECKSTEIN: September 11th. I think we should have a status report on RMBS and, I think, assess where we are. And by that point in time, I think, at least from our perspective, I think we'll have a better sense of what can be accomplished when. We obviously are -- we're making substantial requests of the debtor for samples of loan files. We know that's going to take the debtor some time to produce. We're trying to

determine how quickly those loan files can be reviewed so that we can have a reasonable sample, and --

THE COURT: All I know is when FHFA was here on the discovery issue and they said well, they'd narrowed their request to 5,000 loan files, Cravath, on behalf of CSFB made clear in their objection that their experts have said that that's far too narrow a sample. I don't know what --

MR. ECKSTEIN: Sampling is a controversial issue. We will save for a later day what is an appropriate sample, but there will be a sample that's going to be needed, and, obviously, even fewer than 5,000 is going to be an undertaking that's going to take some time. So that is coming out, and I think by the 11th of September we'll have a sense of what was produced and what can be reviewed and how much time people are going to need to complete that project.

There obviously are many other issues aside from reviewing loan files that --

THE COURT: Sure.

MR. ECKSTEIN: -- need to be considered.

THE COURT: And it looks like there's about fifteen lift stay motions that are on that day.

MR. LEE: I thought Your Honor's opinion would dispose of some of them.

THE COURT: I keep issuing opinions, but they keep coming in. Okay.

MR. ECKSTEIN: Okay.

THE COURT: Anybody else? Do you have anything you want to say to that, Mr. Lee?

MR. ECKSTEIN: Thank you, Your Honor.

THE COURT: With respect to what Mr. Eckstein has reported?

MR. LEE: Your Honor, the -- sorry. Gary Lee from Morrison & Foerster for the debtors. Mr. Eckstein and his team are actually working very hard with our group. I mean, there are not just weekly meetings. There are, sort of, frequent conversations several times a week, so we think that we are hopefully on track for a hearing on the 5th of November. I don't want to understate the difficulties that Mr. Eckstein is going through. I understand the need for an expert, and we believe that that will all culminate --

THE COURT: Look, you have your experts in place, right?

MR. LEE: We do, Your Honor.

THE COURT: And you, essentially, have your experts in place as of last night.

MR. ECKSTEIN: I hope so.

THE COURT: So, one of the things I would strongly urge is there is nothing -- there are few things more frustrating to a Court to have the battle of the experts where they can't even agree on what the appropriate data to be

considered is. And so yes, they reach very different conclusions, but they also have very different inputs to start with.

To the extent your experts can meet face-to-face and try and agree what the appropriate sampling is, that's fine. They'll reach their own -- they'll have separate opinions and everything, but it's just going to complicate your lives and mine, in particular, when you can't even agree on those basics. And maybe you won't, but I just -- and I appreciate the fact that you're -- and maybe you're already doing this, maybe you're trying to do this, but to the extent you can cut out as many disagreements as possible, at least start with what's the appropriate dataset to be reviewing, and then their experts will, you know, they'll reach their own conclusions from it. I don't know whether that's possible or not.

MR. LEE: I think it's not only possible but it -- as a practical matter it's happening.

THE COURT: Okay.

MR. LEE: We're prepared to make our expert available, the data he's reviewed. I mean, this is genuinely a cooperative process. I think we all recognize just how much work needs to get done before November the 5th, and there's, you know, it is not adversarial in the slightest, Your Honor.

(Pause)

THE COURT: How many days did I say I was blocking out

for this? Did I say how many days I was blocking out for this?

MR. LEE: Three, Your Honor.

THE COURT: Three.

Oh, yeah. November 6th is Election Day and the Court's closed. That's why. So it's Monday, Wednesday. Thursday it didn't get put on the calendar but we'll make sure we get that day blocked.

THE CLERK: It actually is.

THE COURT: It is? I'm sorry.

THE COURT: We'll look.

MR. LEE: Thank you, Your Honor.

THE COURT: Okay. We're adjourned. Thank you very much everybody.

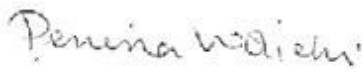
(Whereupon these proceedings were concluded at 12:43 PM)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript is a true and accurate record of the proceedings.



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